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ABSTRACT

This document is intended to provide career and technical education faculty and administrators with information on institutional liability relating to workplace violence as documented in court cases. The major legislation regarding violence in schools is summarized. Seventeen warning signs of violence are presented along with simple steps administrators, faculty, and staff can take to prevent violence. The distinction between litigation and liability is explained along with principles of negligence. Selected court cases dealing with negligent hiring and retention, negligent referral, and negligent placement of students are summarized. Basic items that should be included in a workplace violence policy are listed. The following suggestions for avoiding institutional liability are offered: (1) establish a workplace violence policy; (2) create and train a workplace violence team; (3) treat threats of violence seriously; (4) conduct adequate background checks; (5) ask potential employees about criminal history; (6) refer to the sex offender registry; (7) conduct thorough reference checks; (8) obtain personnel files from previous employers; (9) train supervisors in applying workplace violence policies; (10) pay attention to warning signs; (11) keep good records of misconduct and efforts to correct it; (12) try to foresee potential incidents; and (13) evaluate situations and appropriate responses on a case-by-case basis. A sample workplace violence policy is attached. The bibliography lists four references. (MN)

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VIOLENCE IN THE WORKPLACE: AVOIDING INSTITUTIONAL LIABILITY

December 13, 2002

Association for Career and Technical Education

Las Vegas, Nevada

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Bradley H. Hall, J.D.

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VIOLENCE IN THE WORKPLACE: AVOIDING INSTITUTIONAL LIABILITY

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VIOLENCE IN THE WORKPLACE: AVOIDING INSTITUTIONAL LIABILITY

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INTRODUCTION

On October 1, 1975, Lloyd Cobb shot and killed his estranged wife at the Idaho State University Office of the President. His wife was an employee in the president's office. Mr. Cobb was arrested and charged with first degree murder. Cobb entered a guilty plea to the offense of second degree murder and was sentenced to a life term of imprisonment. After serving nearly 12 years in prison, Mr. Cobb received parole. Two months later, he died.

In April 1999, Eric Harris and Derrick Kleibold terrorized students and educators at Columbine High School in Colorado. Students and faculty were injured and killed during the terrorist type attack by Harris and Kleibold. The two terrorists ended the ordeal by taking their own lives.

In February 2002, a Ferrum College (Virginia) student committed suicide by hanging himself with a belt in his dorm room. His guardian filed a wrongful death suit.

In October 2002, Robert Steward Flores, Jr., 41 year old nursing student at the University of Arizona (Tucson), taunted three nursing professors before killing them. He then took his own life.

PURPOSE

The purpose of this presentation is to provide career and technical education faculty and administrators with information on institutional liability relating to workplace violence as documented in court cases. This information may be useful in preventing violence in the workplace and, in the event such violence does occur, provide suggestions as to how to respond.

DISCLAIMER

This presentation provides accurate information regarding workplace violence and institutional liability. It should not be considered as legal advice. If legal advice or their expert assistance is required, seek the services of a competent, local professional. Please seek legal counsel through whatever process exists in your home institutions in order to determine what courses of legal protection and action are available to you.

FACTS

Violence in our nation's public schools is increasing. Students do not feel safe. According to the National Center for Education, 28 percent of public school students were likely to report street gangs were present in their schools during 1995. This is compared to 15 percent only six years before. (National Center for Education Statistics Fast Facts, *School Safety*, http://www.nces.ed.gov/fastfacts)

Faculty, staff, and administrators do not feel safe, either. According to the *Journal of Criminal Law and Criminology*,

> It is an unfortunate and distressing fact that today teachers and students are many times the victims of violence perpetrated by students. It has been estimated that everyday in the United States, 6,250 teachers are threatened with violence and 260 teachers are physically assaulted.

LAWS AGAINST VIOLENCE

There are several laws against violence in educational settings. Most are designed to address violence at the K-12 setting.

Gun Free Schools Act of 1994

The Gun Free Schools Act of 1994, 20 U.S.C. § 8921 *et seq.*, specifically focuses on K-12 education. According to this act, weapons are not to be possessed within 1000 feet surrounding a public or private school campus. This law also provides the legal definition of weapons.

Safe and Drug-Free Schools and Communities Act of 1994

The Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C. § 7101, *et seq.*, also has a K-12 emphasis. This act is primarily a funding mechanism to assist states and local districts with drug prevention and restricting crimes around schools.

Jeanne Clery Act of 1998

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1998 has a postsecondary emphasis. All private and public postsecondary institutions who receive financial aid are subject to this act. A report must be submitted annually by October 1 and must include three years' crimes statistics.

WARNING SIGNS OF VIOLENCE

Violent people cannot be identified by their appearance alone. However, there are multiple warning signs of violent behavior. Among the most commonly listed behaviors or warning signs are the following:

- History of violent behavior
- Expression of homicidal or suicidal thoughts
- Substance abuse

- Active psychotic symptoms
- Preoccupation with violence, police, military, or survivalism
- Threatening or intimidating ("in your face") behavior
- Anger, hostility, temper tantrums
- Persistent pursuit or stalking
- Aggressive sexual behavior
- Preoccupation with firearms or weapons of any nature
- A distorted perception of being "picked on"
- Holding grudges; creating or stating "lists" of enemies
- Belligerence, insubordination
- Inordinate or inappropriate use of e-mail or the Internet
- Strong racist or sexist views
- Severe jealousy
- Repeated use of grievance processes for minor or frivolous purposes

(Hall & Marsh, p. 355-356).

PREVENTION OF VIOLENCE

According to a February 22, 2000 article in *The Detroit News*, a supervisor and co-workers were credited with the prevention of an office massacre. A Detroit worker demonstrated extreme anger on the job for several weeks. He appeared to have a preoccupation with guns and appeared at work with a military-style haircut. He was reported to have told co-workers the haircut was for "when I go psycho."

Alert co-workers informed their supervisor, who, in turn, notified police. The man was arrested on charges of weapons possession. Police state that it is likely the quick action of the co-workers and supervisor prevented an office massacre.

Administrators, faculty, and staff should observe their co-workers and students. Watch for and report any of the warning signs of violent behavior. Follow institutional policies in dealing with violence in the workplace. Do not confront a hostile, violent individual by yourself.

LITIGATION OR LIABILITY

Litigation may simply be defined as a lawsuit and does not automatically mean *liability,* or legal responsibility. The American justice system is open to everyone. Individuals wishing to bring forth lawsuits in court have that right. It should be noted, however, that plaintiffs succeed in a relatively small number of cases.

NEGLIGENCE IN GENERAL

Conduct which falls below a legal standard, or duty, established to protect others from harm is known as *negligence*. Failure to meet this standard is known as a *breach of duty*. A closely related concept is that of forseeability. See, for example, the quotes from the following two court cases.

"A defendant is not liable for every untoward event that occurs on its premises, a defendant 'will be liable only if the wrongful activities are foreseeable.'" *Peck v. Siau*, 827 P.2d 1108, 1113 (Wash.Ct.App. 1992).

"The question of whether a risk of harm is foreseeable is generally a question for the trier of the fact [jury]." *Caldwell v. Idaho Youth Ranch*, 968 P.2d 215, 220 (Idaho 1998).

Negligence Principle #1

The first principle of negligence is that negligence is a legal standard. The fact of the injury alone does not equate to liability.

The duty, or standard of care, imposed upon an institution will likely be higher when the plaintiff is a K-12 student in an *in loco parentis* situation, or if a postsecondary student is a business invitee, such as a resident of student housing. *See, e.g., Johnson v. State*, 894 P.2d 1366 (Wash.Ct.App. 1995).

Another example of Negligence Principle #1 is the school shooting case in Paducah, Kentucky. There were multiple defendants involved. Liability was not considered automatic. The law does not generally consider criminal acts to be foreseeable. Additionally, depending upon state laws, public entities may have legal immunity.

Negligence Principle #2

The second principle of negligence is that it is much easier to avoid liability if bad characters are not hired in the first place. It is critical that proper hiring practices are in place to prevent employing individuals with poor character.

In the case of *Goyer v. Edwards*, 588 N.W.2d, 701, (Iowa 1999), three elements of negligent hiring were identified.

- Employer knew, or in the exercise of ordinary care should have known, of its employees unfitness at the time of hiring;
- Through the negligent hiring of the employee, the employee's unfitness or dangerous characteristics proximately caused the resulting injuries; and
- There is some employment or agency relationship between the tortfeasor and the defendant employer.

Negligent Principle #3

The third principle of negligence is the adage that "If you can't say something nice, it is better to say nothing at all." Caution needs to be used when providing references for employees and/or students, especially if there is a real or perceived threat of violence.

NEGLIGENT HIRING AND RETENTION

Negligent retention, supervision, and negligent hiring claims are frequently combined. The most common allegations made in negligent hiring cases include the failure to:

- conduct an adequate criminal background check
- adequately check employment history – such as gaps in employment
- check references or to follow-up on questionable areas
- adequately complete the interview process (too perfunctory).

In negligent hiring and retention cases, the employer may be perceived to have done nothing to prevent the crisis. The idea is that the employer was aware of dangerous proclivities of a worker but failed to terminate employment and/or adequately supervise the worker, who then commits a violent act upon a co-worker, student, or third party. In *Godar v. Edwards,* 588 N.W.2d 701 (Iowa 1999), it was concluded:

> in order to recover based on a claim of negligent hiring, a plaintiff must prove the following:
>
> (1) that the employer knew, or in the exercise of ordinary care should have known, of its employee's unfitness at the time of hiring;
>
> (2) that through the negligent hiring of the employee, the employee's incompetence, unfitness, or dangerous characteristics proximately caused the resulting injuries; and
>
> (3) that there is some employment or agency relationship between the tortfeasor and the defendant employer. (*Id.* at 708-709).

THREATS OR ACTS OF VIOLENCE

Negligent hiring and retention are found to exist in employment situations when threats or acts of violence occur. Additionally, reports of violence are only made after the employee is gone and/or the act of violence has occurred. Acts of violence may have been avoided if (1) proper background searches had been conducted, (2) co-workers had reported threats of violence, and (3) action had been taken by employers.

Sheerin v. Hollin Co.

In *Sheerin v. Hollin Co.*, 380 N.W.2d 421 (Iowa 1986), the administrator of the estate of an individual murdered during a sexual attack by a fellow employee at the motel where the deceased and the other employee worked brought claims based on (1) failure to acquire adequate information about the assailant's history of violence, (2) failure to warn other employees of the assailant's background involving sexual assault, (3) failure to adequately protect other employees from the assailant, and (4) allowing the assailant access to dangerous instrumentalities. (Hall & Marsh, p. 350).

Harrington v. Louisiana State Board of Elementary and Secondary Education

The case of *Harrington v. Louisiana State Board of Elementary and Secondary Education*, 714 So.2d 845 (La.App.4 Cir. 1998) is an appellant case and involved a Delgado Community College student who was raped by her instructor. The student (Harrington) was an assistant to the culinary arts program director (Veller). In the first case, the trial court entered judgment against Veller individually and indicated that the State was not vicariously liable for his actions. The court did not consider the State negligent in hiring Veller. However, on appeal, the circuit court reversed both decisions. Veller and the State were both held accountable and the amount of the award to Harrington was increased.

In court, Veller testified that no one had inquired about his past at the time he was hired. He had, in fact, prior convictions of possession of marijuana with intent to deliver, theft or grand larceny, interstate transportation of forged securities (having served 20 months in federal prison), and an outstanding warrant of undisclosed nature in Illinois.

In the negligent hiring claim, the circuit court stated:

> Delgado had a duty to use reasonable care when hiring a person placed in a position of authority as a professor. Delgado breached its duty by hiring Veller, a convicted felon who had served time in prison. The fact that Veller was an instructor at Delgado and Director of the …culinary apprenticeship programs of Louisiana, put him in a position to harm Harrington; Delgado's conduct was substandard for failing to screen a prospective professor and that was a cause-in-fact of the injury…The risk of being raped or harmed by a professor in a position of authority can be associated with the duty to use reasonable care when hiring (*Harrington V. Louisiana State Board of Elementary and Secondary Education, supra*, 714 So.2d at 851).

NEGLIGENT REFERRAL

The person writing a letter of recommendation owes duty to the prospective employer and third persons not to misrepresent facts in describing the character and qualification of the employee if making such misrepresentations would present a substantial, foreseeable risk of physical injury to the prospective employer or third party. The following options to avoid liability are available to employers required to complete references:

- Writing a "full disclosure" letter, revealing all relevant facts;
- Writing a "no comment" letter, omitting any affirmative statements; and
- Merely verifying basic employment dates and details.

Randi W. v Muroc Joint Unified School District

In *Randi W. v. Muroc Joint Unified School District,* 929 P.2d 582 (Cal. 1997), a sexually molested student sued, among others, the former school district employer who gave an unreserved, positive recommendation to placement service which helped the offending employee in a second school district. The court held that:

(1) a person writing a letter of reference *does* owe a duty to the prospective employer *and* third persons [the injured student] not to misrepresent the facts in describing the qualifications and character of a former employee, if making such misrepresentations would present a substantial, foreseeable risk of physical harm to the prospective employer or third party;
(2) the letters from District #1 made affirmative misrepresentations by positively evaluating the employee's character and rapport with students without disclosing that disciplinary actions had been taken against him for sexual misconduct' and
(3) the injured student needn't show *reliance* on the misrepresentations – only that injury resulted from the misrepresentations.

(Hall & Marsh, p. 353).

Additional Negligent Referral Cases

Additional negligent referral cases include *Louviere v. Louviere,* 2002 WL 12901930 (La.App.1 Cir., June 5, 2002) (Parish sheriff's deputy goes on crime spree, killing one and injuring several others, following negligent letter of referral) and *K.S. v. Summers,* 799 So.2d 510 (La.App. 1 Cir. 2001) (State's failure to disclose former employee's expunged felony drug conviction was not the *legal cause* of the assault). These two cases resulted in opposite outcomes. In the *Louviere* case, the court held the referring district responsible for negligent referral. In *K.S. v. Summers*, the court implied that if a second employer is negligent in conducting the application and interview process, it should not look to blame a prior employer.

NEGLIGENT PLACEMENT OF STUDENTS

Career and technical educators need to be aware of the risks involved in negligent placement of students on internships. The case of *Gross v. Family Services Agency, Inc.*, 716 So. 2d 337 (Fla.App. 4 Dist. 1998) was the first of two cases involving Nova Southeastern University and Bethany Jill Gross (Hall & Marsh, p. 318). The case highlights the duty owed students placed on internships by the educational institution. In this case, the student (Gross) was criminally assaulted while leaving her off-campus internship site. Gross filed a negligent action against Family Services Agency, Inc. and Nova Southeastern University, alleging that she was assigned to a facility which was know to present the potential of unreasonable harm and risk. The Circuit Court, Broward County, decided in favor of the university. It was decided that Nova "did not own, operate, or control the premises where (Gross) was abducted and later assaulted" (*Gross v. Family Services Agency, Inc. at 338).*

In March 2000, the case of *Nova Southeastern University, Inc. v. Gross,* 758 So.2d 86 (Fla. 2000), was heard in the Florida Supreme Court. Nova argues that since Gross was an adult student, the university did not owe her a duty. They further contended that there was no "special relationship between a university, where attendance is not mandatory, and an adult student because the university is not standing *in loco parentis* to an adult student" (*Id.* at 89). On March 30, 2000, the Florida Supreme Court determined that universities may be held liable for injuries suffered when students are placed in off-campus internship sites which are known to be dangerous (Hall & Marsh, p. 318).

WORKPLACE VIOLENCE POLICY

Many educational institutions have created and implemented workplace violence policies. There are many good reasons to have such policies, not the least of which is to clearly inform employees, students, and third parties that threats of violence will not be tolerated. A sample workplace violence policy, used by permission of authors, is provided with this presentation.

Workplace violence policies should contain the following information. Refer to sample document for clarification of content.

- Institutional data
- Purpose
- Goal
- Guidelines
- Procedures
- Scope
- Information

Workplace violence policies must be provided to all employees who should, in turn, be familiar with them. No policy is of value if created and left on a shelf. Distribution should be widespread and employees should be familiar with the policy and procedure. Additionally, workplace violence policies should be reviewed on a regular basis to maintain current and accurate information.

AVOIDING INSTITUTUIONAL LIABILITY

Since everyone has access to the court system, many take advantage of the opportunity to bring litigation against educational institutions. As such, it may be difficult, if not nearly impossible, to prevent litigation in the workplace. However, there are steps which may be taken to avoid liability in the even litigation does occur.

- Establish a workplace violence policy.
- Create and train a violence workplace team.
- Treat threats of violence seriously.
- Conduct adequate background checks.
- Ask potential employees about criminal history.
- Refer to the sex offender registry.
- Conduct thorough reference checks.
- Obtain personnel files from previous employees (with applicant's permission).
- Train supervisors in the application of workplace violence policies.
- Pay attention to warning signs.
- Keep good records of misconduct and efforts to correct.
- Think! What really is foreseeable? What would a reasonable person do under similar circumstances.
- Evaluate each situation and the appropriate response on a case-by-case basis.

When dealing with issues involving employees and the Americans with Disabilities Act (ADA), it is critical that the focus is on the behavior rather than the individual. Rely on medical documentation, as available. Misconduct need not be excused even when a disability exists.

SUMMARY

Issues surrounding violence in the workplace and in the educational setting are varied and often complex. Generally, courts are sympathetic to employers who must deal with real or apparent threats of violence. Career and technical institutions must also be aware of the duty, depending on the specific circumstances, to provide reasonable security for their students, both residential and nonresidential, and in some jurisdictions, even when

students are assigned practicums. Institutions must also, depending on the circumstances, take care to warn third parties of possible violence by students or employees who have expressed intent to harm others. (Hall & Marsh, p. 382)

Educational institutions, districts, and other appropriate agencies must establish policies and procedures which address violence in the workplace. Since most of the legal rules and cases addressing violence issues are a matter of state law, each career and technical education administrator or educator is advised to consult competent local counsel in addressing specific issues (*Id.*).

SAMPLE WORKPLACE VIOLENCE POLICY

SPRINGFIELD COMMUNITY COLLEGE
Violence in the Workplace Guidelines
Rev. 1/31/02

PURPOSE

Springfield Community College (SCC) would like to ensure that all employees and anyone that we come in contact with in the workplace have the right to be free from acts or threats of violence. The following guidelines and procedures have been adopted by SCC.

GOAL

It is the goal of SCC to provide a workplace free from violence. Everyone that we come in contact with in the workplace, including employees, students, and public-at-large, deserves to be treated with courtesy and respect. This means that SCC employees will treat each other, our customers, our suppliers, and all others with dignity. We expect the same treatment in return.

GUIDELINES

All threats and acts of aggressive behaviors (also interpreted as violence) should be taken seriously and addressed immediately. Such threats or acts include, but are not limited to:

- Possessing and/or brandishing a weapon on SCC property.
- Damaging or threatening to damage SCC property or the property of any employee or guest.
- Harming or threatening harm to any employee or guest of SCC.
- Demonstrating stalking behavior toward any employee or guest, including inappropriate telephone calls.
- Self-injurious behavior or threats of suicide.

PROCEDURES

Acts of violence or threats of imminent violence require immediate response.

1. Dial 911.
2. Contact your immediate supervisor.
3. Contact campus security at extension 555.

Employees who have been the recipients or observers of violence as defined above should proceed as follows:

1. Notify your immediate supervisor as soon as possible after the incident occurred.
2. Contact campus security at extension 555.
3. Allegations of violence brought to the attention of the administration and campus security will be investigated in a timely and complete manner. Insofar as possible, the investigation will be conducted in a confidential manner to the extent that only those parties who have a definite need to be involved in the investigation will be involved. Threats or attempted acts of suicide or other violence may overrule the confidentiality regulations required by the Family Educational Rights and Privacy Act (FERPA).

SCOPE

Springfield Community College views threats or acts of violence, or any conduct which is disruptive and contrary to the establishment and maintenance of a safe, productive, and supportive work environment seriously. Such behavior will not be tolerated.

Any person who makes substantial threats, exhibits threatening behavior, or engages in violent acts on SCC property shall be removed from the premises as quickly as safety permits and shall remain off the premises pending the outcome of an investigation

SCC will initiate an appropriate response which may include, but is not limited to, suspension and/or termination of any business relationship, reassignment of job duties, suspension, or termination of employment and/or criminal prosecution of the person or persons involved.

These guidelines apply to all current and former employees, current and former students, and members of the public-at-large.

INFORMATION

For additional information related to the guidelines and procedures, including training, advise, and counsel, contact campus security, extension 555, or the Office of Human Resources and Management, extension 333.

Hall, B. H. and Marsh, R. J. (2003) *Legal Issues in Career and Technical Education.* Homewood, Illinois: American Technical Publishers, Inc.

VIOLENCE IN THE WORKPLACE: AVOIDING INSTITUTIONAL LIABILITY

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National Center for Education Statistics Fast Facts, *School Safety*, http://www.nces.ed.gov/fastfacts

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